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NO. 93-853

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

MARGARET S. ROWLAND,
PETITIONER

V.

ROBERT E. KINGMAN,
RESPONDENT

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On Petition for Writ of Certiorari
to the Supreme Court of Maine

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# OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Certiorari is sought to overturn a decision of the Supreme Judicial Court of the State of Maine, which upheld the trial court's custody decision as being in the best interests of the parties' two children, and which refused to pass on Petitioner's constitutional questions because she waived them. (Petitioner's Appendix, hereafter "P.App.", at 38, 48.)

1. Does this Court have certiorari jurisdiction where Petitioner failed to preserve her federal constitutional claims and where she does not now present important federal constitutional questions?

2. Were Petitioner's federal constitutional rights denied by application of Maine's constitutionally neutral custody statutes, or by ex parte interim process to

enforce its prior orders, which allowed her a subsequent full hearing on all issues?

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## JURISDICTIONAL STATEMENT

This Court has no certiorari jurisdiction to review this case. Petitioner did not timely present or otherwise preserve her constitutional claims. Furthermore, Petitioner's claims are not sufficiently important to warrant this Court's exercise of certiorari jurisdiction.

## STATEMENT OF THE CASE[1]

Petitioner and Respondent separated in 1989 and divorced in May of 1991. Their divorce agreement and judgment required them to "share parental rights and responsibilities"[2] with respect to their two children, Edwin and Meagan. (P.App. 55.) Respondent was very involved in his children's lives; he saw his children on 200 days in each year since the parties' separation; was a Cub Scout leader and a sports coach; and regu-

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[1] The Petition contains numerous misstatements about the factual underpinning and nature of the Maine decisions. This opposition clarifies those misstatements Respondent believes important to this Court's assessment, and adds critical facts Petitioner chose to omit.

[2] This phrase comes from Maine's statute and describes a joint parental decision-making arrangement. 19 M.R.S.A. § 752(2). (Respondent's Appendix, hereinafter "App." 17.) Petitioner did not, as her petition infers, have full custody of the Kingman children. (Passim.)

larly attended school-related and extra-curricular activities. His children felt loved and secure with him. (P.App. 73, 77, 79.)

In February 1992, Petitioner told the children that they were moving to Oregon. The children felt "sad and mad" about the Oregon move. They feared the loss of continuous and frequent contact with their father, as well as the loss of their important ties to the Yarmouth, Maine, community where they had lived all their lives and had enjoyed continuity of school, friends, and activities. (P.App. 145.) Because Respondent believed it would be better for his children to remain in Yarmouth, he filed a motion to change the children's primary physical residence to him in March 1992. He planned to move a relatively short distance

to Yarmouth to preserve his relationship with the children, and preserve their sense of community and belonging in the town and school system which assisted their successful post-divorce transition. (P.App. 87-88.)

After Respondent filed his motion, and before a hearing was held, Petitioner bought a house in Oregon, married an Oregon resident, placed her Maine residence on the market, closed her medical practice, bought non-refundable plane tickets for the final move, hired movers, and held a going-away party for the children. (P.App. 136.) Respondent's motion to change the children's residence was heard on August 6th, 13th, and 14th. At this hearing, both parties fully litigated the issue of whether the child-

ren's "best interests"[3] would be maximized by residing in Yarmouth, Maine, with their father, or by moving to Lake Oswego, Oregon, to live with their mother and new stepfather.

Respondent testified at length about his intentions to move to Yarmouth, about a home he planned to rent, and about his children's happy life in that community. Petitioner testified about her new home in Lake Oswego, and that she would not move to it if the court transferred the children's primary residence to Respondent. (P.App. 144-147.) At the end of trial, the parties agreed that the court would enter a prompt short decision and render a more complete

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[3] Maine courts are required to review parental rights and responsibilities orders by determining the children's best interests. 19 M.R.S.A. § 752(5). (App. 20.)

decision after trial justice Beaudoin's vacation. His August 17th order transferred primary residence of the children to Respondent when Petitioner moved to Oregon. (P.App. 90-91.)

Petitioner decided to take the children with her to Oregon, anyway. She then engaged in a series of deliberate fabrications which successfully hid her move from Respondent and the court. (P.App. 152-154.) On August 24, 1992, Petitioner moved to Oregon with the children without informing their father, their guardian ad litem, or the court. Immediately upon her arrival in Oregon, Petitioner obtained an ex parte order, unsupported by the required Uniform Child Custody Jurisdiction Act ("UCCJA") affidavit, changing the terms of the Maine

order and giving her custody of the children. O.R.S. 109.790 et seq. (App. 9, 25.)

When Respondent learned of his children's removal from Maine, he applied in Maine for a temporary restraining order, writ of habeas corpus, and an order of contempt. On August 27, 1992, Justice Cleaves issued an ex parte temporary restraining order in aid of the August 17th custody order, awarding immediate sole custody of the children to Respondent, and setting the contempt and injunctive matters for further hearing and permanent decision. (P.App. 94.)

Based on these Maine orders, Respondent obtained a writ of assistance in Oregon,[4]

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[4] Unlike Petitioner, Respondent filed the required UCCJA affidavit fully alerting the court of the contents of the Maine order and nature of the proceedings in Maine.

allowing him to retrieve his children. Respondent returned them to their home in Yarmouth, Maine, where he had rented an apartment. Respondent promptly informed Petitioner of his Yarmouth address, notwithstanding her contrary assertions.[5]

Petitioner filed various post-judgment motions seeking to vacate or reconsider the August orders. (P.App. 103, 132.) These were heard in September, along with Respondent's post-judgment enforcement motions regarding Petitioner's surreptitious removal of the children to Oregon. The trial court heard testimony from the guardian ad litem that the children were relieved to be with

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[5] On August 28, 1993, the day Respondent returned from Oregon with the children, Petitioner's minister, Kenneth Baily, had already visited Respondent's home and investigated it, and reported back to Petitioner. (App. 15.)

their father in Yarmouth, Maine. The evidence demonstrated Respondent's ability to provide a wonderful home for his children, the damage the children suffered in his absence, and confirmed the wisdom of the court's August 17th decision. (P.App. 157-158.)[6]

After the trial justice's November 19, 1992 order denying Petitioner's motions and reaffirming, in detail, the decision to preserve the children's home in Yarmouth, Petitioner commenced an action in Oregon against Respondent and his Oregon attorney.

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[6] The evidence is contrary to Petitioner's assertions in passim that Respondent's home was unsuitable. The record is devoid of any finding, comment, or reference that Respondent's home was unsuitable for his children; and, in fact, is replete with positive statements about his ability to provide a stable, nurturing, and adequate home. (P.App. 69, 70, 73, 77, 85, 87, 133, 143, 158.)

This involved a motion for sanctions for moving the children from Oregon to Maine in contravention of the illegal Oregon status quo order. (App. 9.)[7]

Petitioner filed an appeal to the Maine Supreme Judicial Court, and requested an "expedited briefing schedule" to accommodate her emotional distress. Attached to this motion were her and her husband's affidavits (P.App. 7, 23), which attempted to bring "facts" not in evidence before the appellate court. The Supreme Court denied her motion and struck the affidavits. (App. 1.) She filed the affidavits again with a motion to supplement the record. The court denied her second motion and again struck the affidavits. (App. 3.) These affidavits now

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[7] Petitioner lost this case during the appeal proceedings. (App. 9.)

appear as pleadings in her appendix to this Court, despite their complete irrelevance to the proceedings below. Petitioner lost her appeal. She asked the Maine Supreme Judicial Court to reconsider; her motion was denied. (P.App. 53.) She then sought certiorari.

## ARGUMENT

### I. This Court Should Deny the Petition for Writ of Certiorari for Want of Jurisdiction

Petitioner premises jurisdiction on 28 U.S.C. § 1257(3), alleging denial of rights and privileges under the United States Constitution. This Court does not have certiorari jurisdiction if the federal questions were improperly presented or waived. Crowell v. Randell, 10 Pet. 368, 391 (1836); McGoldrick v. Compagnie Generale, 309 U.S. 430, 434 (1940). If the state court fails

to pass upon the federal question, it is presumed these questions have been waived. Street v. New York, 394 U.S. 576, 582 (1969); and see Chicago, I. & L.R. Co. v. McGuire, 196 U.S. 128, 131-33 (1905); Bailey v. Anderson, 326 U.S. 203, 206-07 (1945); Fuller v. Oregon, 417 U.S. 40, 50 n. 11 (1974); Exxon Corp. v. Eagerton, 462 U.S. 176, 181 n. 3 (1983). Petitioner must rebut this presumption by specifying in her statement of the case:

> the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; . . .

Sup. Ct. R. 14.1(h).

The Supreme Judicial Court of Maine stated Petitioner did not properly present

or preserve the federal constitutional question[8]:

> Rowland also argues that the judgment violated her constitutional rights to travel and marital privacy. Because these arguments were not made before the trial court, they are not cognizable on appeal. Morris v. Resolution Trust Corp., 622 A.2d 708, 712, n. 2 (Me. 1993).

(P.App. 38.) Petitioner did not rebut the presumption that she waived her constitutional arguments. Her statement of facts does not reference where in the trial proceedings she raised her claimed federal questions, how she raised the federal issues, or how they were passed upon by the court. Petitioner states the issues were briefed before the appellate court, but she

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[8] Maine's decisional law protects properly invoked constitutional claims. Osier v. Osier, 410 A.2d 1027 (Me. 1980); Jacobs v. Jacobs, 507 A.2d 596 (Me. 1986).

fails to state exactly how she timely articulated them before Judge Beaudoin's August 17th decision, or even his November 19th decision.[9] Thus, Petitioner failed to preserve her constitutional claims.

Even if Petitioner had not waived her constitutional claims, they are not sufficiently important to warrant this Court's review. The constitutional rights to which Petitioner refers, the right to travel and to marry, are important rights, but in this case they do not provoke constitutional analysis which might inform a greater public. Because custody cases are unique, fact-driven, and defined and molded by

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[9] Part of Petitioner's argument references "motion material" which she claims raised her constitutional issues. (Petition, hereinafter "Pet.", 55.) To the contrary, these motion materials do not even cite to any specific constitutional provision, or contain the phrase "due process."

divergent state statutes bearing on the topic, this Court can make no formulation of universal guiding principles to assist in deciding child custody cases. Rice v. Sioux City Cemetery, 349 U.S. 70, 74 (1955); Layne and Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923).

One of the state court's duties in fact-driven relocation cases is to balance one parent's rights to move and marry against the other parent's countervailing rights to maintain, cultivate and mold a relationship with his or her children. Pierce v. Society of Sisters, 268 U.S. 510 (1924); Myer v. Nebraska, 262 U.S. 390 (1923); Franz v. United States, 70 F.2d 582, 595 (D.C. Cir. 1983). See Karst, Freedom of Intimate Association, 89 Yale L.J. 624, 627 (1980). The delicate balancing of compet-

ing interests in child custody disputes has long been the province of the state courts. As Chief Justice Rehnquist observed:

> If ever there were an area in which federal courts should heed the admonition of Justice Holmes that "a page of history is worth a volume of logic," it is in the area of domestic relations. This area has been left to the States from time immemorial, and not without good reason.

Santosky v. Kramer, 455 U.S. 745 (1982). The only way to parse the thicket of competing parental constitutional rights is to focus only on what is best for the children. Maine's statute requires this examination. Maine's courts did it.

Maine has a constitutionally neutral statute providing that, when both parents are Maine residents, the intended removal of children from the State of Maine permits review of the parental rights and respon-

sibilities "in the children's best interests."[10] This statute contains no presumptions favoring either the traveling parent or the remaining parent; no presumptions for or against physical custody in the mother or father; and no presumptions favoring continued primary "residence" with one parent. (P.App. 41.) Instead, the overall welfare of the children is examined using 13 statutory criteria to determine what is in the children's best interest. 19 M.R.S.A. § 752(5)(A)-(L). (App. 20.)

The court's November 19, 1992 order illustrates its careful review of all the evidence affecting the children's best interests, and a proper application of Maine's neutral statute. (P.App. 132-168.) Petitioner's unhappiness with the outcome of

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[10] 19 M.R.S.A. § 752(12). (App. 23.)

the custody case has driven her attempt to exalt custodial claims into constitutional questions.

No doubt Petitioner is torn between staying in Maine to be near her children, and being in Oregon with her new husband. The Constitution, however, does not guarantee easy choices in life. There is nothing in Maine's "best interests" of the child statute which improperly burdens rights to marry, travel, and raise children. No order of a Maine court required Petitioner remain in Maine or that she not remarry. The court found on the particular facts of this case that the children would be better off remaining in Maine with their father than moving to Oregon with their mother. When Petitioner violated the terms of the court's order, the Maine court proceeded to enforce

its decision, after affording her a hearing to justify her conduct. There is no important constitutional question hidden in this custody dispute.

Petitioner would have this Court create and impose a presumption of continuing custody in the primary residential parent when that parent moves from state to state. There is no precedent to impose such a presumption in order to assure the moving parent of constitutional rights to travel and to remarry. This Court has already rejected application of presumptions in child custody cases.

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the

> important interests of both parent and child. It therefore cannot stand.

Stanley v. Illinois, 405 U.S. 645 (1972). (P.App. 41.) Like this Court, Maine also specifically rejects the use of presumptions in custody disputes. 19 M.R.S.A. § 752(12), overruling Villa v. Smith, 534 A.2d 4310 (1988). Jacobs, supra, at 599. Since presumptions are not useful in custody cases, no important federal question exists here.

Because Petitioner failed to preserve the federal constitutional questions, and because her "questions" lack importance to the general public, this Court has no certiorari jurisdiction and must deny the Petition.

II. The Maine Supreme Judicial Court Did Not Deny Petitioner Due Process or Infringe Her Other Constitutional Rights.

Petitioner argues that the court's November 1992 order prospectively revoked her custody if she moved to Oregon, without analysis of Respondent's specific living arrangements. She describes this as a "present determination of future rights."[11] (Pet. at 17.) This statement is incorrect. The court heard three days of testimony in August, and two days of testimony in September, 1992, bearing on the issue of each parent's suitability to provide a primary residence for the children. The guardian's report incorporated in the trial court's decision, concluded that Respondent was capable of providing a stable living

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[11] This issue was never raised below.

arrangement for the children. Mortar and bricks were not the issue. The court found Respondent could provide the kind of nurturing environment which turns mortar and bricks into a home. (P.App. 70.) Thus, the court made a present decision on August 17, 1992, that Respondent was a fit custodial parent and that he would provide a suitable residence for the children. There was nothing prospective about the order.

Petitioner next argues that the orders deny due process because they impose a "crushing economic burden." Although one may assume that this litigation has been expensive for both parties, there is no evidence that these burdens have been "crushingly" severe in absolute or relative

terms.[12] Petitioner did not present this issue to the trial court or Maine's highest court.

Petitioner further argues that the August 27th and November 19th contempt orders denied due process because they were entered "without notice, hearing and an opportunity to comply." Petitioner launches her argument from an incorrect factual premise. She says:

> The language of the August 17 Order provides that after Petitioner moved to Oregon, Respondent Kingman would get custody if he moved to Yarmouth within a reasonable time. (Pet. at 24.)

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[12] Petitioner again relies on her Affidavit and that of her husband, Arthur LaFrance, which the Maine Supreme Court specifically excluded from the record, twice. These affidavits are found at P.App. 7, 23.)

The order actually provided that the children remain in Maine with Respondent when Petitioner moved to Oregon. Only if Respondent did not thereafter move to Yarmouth, Maine, within a reasonable period time following Petitioner's move would the children then go to Oregon. (P.App. 90.)

Petitioner's rights were not "terminated in absentia." (Pet. at 24.) The order transferring custody to Respondent had been entered beforehand and after three full days of hearing. Consequently, Judge Cleaves' August 27th order was not a new custody order entered without hearing. It was a temporary restraining order issued to enforce a previous order, under the safeguards of rules protecting against demonstrated irreparable injury, and with the further safeguard that the entire matter be

heard fully within a few weeks. M.R. Civ. P. 65. (App. 25.)

Petitioner incorrectly charges that the court's August 27th order was punitive and denied her due process. Actually, the order awarding sole custody to Respondent was issued purely to enable him to retrieve the children from Oregon, and enforce the original decision. Maine courts have the power to enforce their decrees by appropriate methods; in this case, a temporary restraining order and an order to show cause. 19 M.R.S.A. § 752(12). (App. 23.) The September hearing was devoted to Petitioner's objections to the August orders, including whether she was in contempt of any order. Thus, Petitioner was afforded the full opportunity, notice, and hearing which she falsely complains was denied her. Moreover,

the November 19th decision restored shared parental rights to Petitioner, leaving no lasting effect to the August 27th enforcement order.

Petitioner also claims that the Maine trial court's finding of contempt is not moot. Whether or not the contempt order against Petitioner, affirmed by the Maine Supreme Judicial Court,[13] is moot does not present an issue of federal constitutional law.

## CONCLUSION

Petitioner presents no important question of constitutional law, and there is no terrible injustice that Maine courts have failed to perceive and correct. Petitioner fully presented her case to move across the

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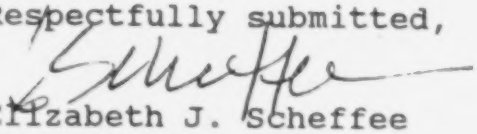
[13] See discussion in the Maine Supreme Court's decision at P.App. 48-49.

country with the Kingman children to the Maine trial court. She lost. Petitioner fully litigated her position regarding the August 28th enforcement order and her claim that she did not understand the August 17th order. She lost. Petitioner litigated, in Oregon, her complaints about Respondent retrieving his children and returning them to Maine. She lost. Petitioner filed an appeal of the trial court's decision and four procedural motions with the Maine Supreme Judicial Court. She lost all of them.

Petitioner is unhappy, litigious, and determined to have her way in this case, even if her way is not judicially sanctioned as being in the best interests of the Kingman children. This Court should deny her Petition for Writ of Certiorari knowing that

the Maine courts have afforded the parties all of their constitutional rights, have indulged no presumption in favor or one party over the other, have seen through sham testimony and selfishness, and have done what was in the children's best interests.

Respectfully submitted,



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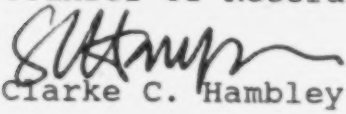

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Dated: December 22, 1993

**CERTIFICATE OF SERVICE**

I hereby certify that three copies of this Opposition and its Appendix have been served by mailing, postage prepaid, first class, on December 22, 1993, to counsel of record as follows:

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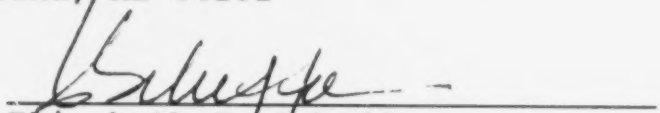

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